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In the Supreme Court of the United States

October Term, 1984

JOANN WILLIAMS,
Petitioner,

vs.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Should the Federal Tort Claims Act allow redress to the surviving widow for wrongful death arising from dental malpractice when the act occurs while her airman husband is on special leave in civilian attire at a U. S. Army Base 420 miles from the decedent's Air Force Base?

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OPINIONS BELOW

Petitioner, Joann Williams, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the opinion (Appendix A1) and judgment (Appendix A1) of that court entered on Sept. 28, 1984, in Case No. 83-3600. That opinion and judgment affirmed the judgment entered in the United States District Court, Northern District of Ohio, Eastern Division, in Case No. C83-1289Y entered on an entry granting Defendant's Motion to Dismiss for lack of jurisdiction over the subject matter in favor of the Respondent and against the Petitioner.

JURISDICTION OF THE COURT

The judgment of the United States Court of Appeals for the Sixth Circuit of which review is sought was entered on Sept. 28, 1984.

In the action filed, Petitioner set up claims involving a wrongful death claim for dental malpractice under the Federal Tort Claims Act, 28 U.S.C.A. 1346 (b), 2671 thru 2680.

Jurisdiction to review the said judgment of the United States Court of Appeals for the Sixth Circuit by writ of certiorari is conferred upon this Court by 28 U.S.C. § 421 et seq.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

STATUTES INVOLVED

The case involves the following statutes:

28 U.S.C.A. § 1346 United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims

against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

STATEMENT OF THE CASE

This action was filed under the Federal Tort Claims Act, 28 U.S.C.A. § 1346 and 28 U.S.C.A. § 2674 in the United States District Court for the Northern District of Ohio, Eastern Division, No. C83-1289Y.

In her complaint, Petitioner, Joann Williams, surviving widow of Jerome Williams, who had been an enlisted man in the U. S. Air Force, alleged that her decedent sustained damages leading to his death as a result of dental malpractice, which occurred on an Army base, a separate branch of the service from the decedent's base, located 420 miles from his Air Force base.

Petitioner's decedent, Jerome Williams, was 26 years of age and was based at the Cannon Air Force Base at Clovis, New Mexico.

Jerome Williams had obtained temporary leave from Cannon AFB to travel to William Beaumont Army Medical Center in El Paso, Texas, 420 miles away for dental treatment.

He was traveling in civilian clothes and received his dental treatment on April 28, 1981.

As a result of the anesthetic, he was caused to go into a coma until June 7, 1981, when he died.

Petitioner alleged in her complaint that she had presented a claim to the Department of the Army for the wrongful death of her decedent. This claim was rejected and the Petitioner filed a complaint under the Federal Tort Claims Act vs. the U. S. Government.

The Respondent filed a Motion to Dismiss on the ground that the court lacked jurisdiction over the subject matter of this action or in the alternative a Motion for Summary Judgment.

The court granted Respondent's Motion to Dismiss for Lack of Jurisdiction over the subject matter and dismissed the Petitioner's complaint.

On appeal to the U. S. Court of Appeals, Sixth Circuit, the court of appeals by opinion and judgment entered on Sept. 28, 1984, affirmed the judgment and order of the District Court.

REASONS FOR GRANTING THE WRIT

The trial court does have jurisdiction over the subject matter of this action.

The Federal Tort Claims Act does not exclude servicemen from its operation. A literal reading of the Federal Tort Claims Act gives no indication of intent to exclude servicemen.

The government's liability for negligence of its employees and agents is expressly extended, to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances. Of the twelve exceptions enumerated in the act, there is only one pertaining to military personnel and that bars all claims arising out of the combatant activities of the military or naval forces or the Coast Guard during the time of war. Receiving dental treatment at another branch of the service at a base 420 miles away, while on leave during peacetime, cannot be considered as an activity arising from a combatant activity and is not within the Act's definition providing for an exception.

It should be noted that the act expressly includes military and naval personnel as employees for whose negligent acts or omissions the Government will be liable.

28 U.S.C. 921(b) (1946)

The act specifically bars combatant claims. This specific exception certainly does not give rise to an inference

that all other servicemen's claims should be barred. The exception concerns the circumstances under which the injury occurred, rather than the status of the injured party.

Congress never intended to exclude servicemen from coverage of the act, particularly following World War II when the public sentiment toward servicemen was most favorable.

Representative Emmanuel Cellers, who drafted the Tort Claims Act and nursed it through three sessions of Committee and House debate to final passage, stated in an article printed in the YALE LAW JOURNAL, reported in

58 Yale Law Journal at page 621

> "The opinion of the Fourth Circuit is utterly erroneous when it says that it was the intent of Congress to exclude a member of the Armed Forces from the benefits of the Tort Claims Act. I am the author of the bill, and I piloted it through the Subcommittee of the House Judiciary Committee, the House Judiciary Committee, and the House. Prior to its passage I worked on this bill for many years, and I repeatedly offered it to successive Congresses before its final passage. I had more to do with it than any other member. I never intended to preclude a suit by a soldier. Despite the fact that the latter might have various and sundry remedies for compensation, pensions, hospitalization, preferences, etc., these benefits had nothing whatsoever to do with, and are utterly unrelated to the right to sue under the Federal Tort Claims Act. The only place where soldiers were ever mentioned was in a section that was cut out of the Act. (see note 8 Supra). We start off with the proposition in general that the Government deliberately removes the defense of sov-

ereignty, except in the cases where the Act specifically makes an exception. The court cannot read the exceptions into the law."

Many cases seeking relief for servicemen and their survivors have been brought in federal courts and a number are presently pending throughout the United States involving the same basic questions of principle.

The U. S. Supreme Court in the case of,

Brooks v. United States,
337 U.S. 49

the court in its opinion at page 51 stated:

"The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not pursuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. None exclude petitioners' claims. One is for claims arising in a foreign country. A second exclude claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war . . . It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain."

The Action Is Not Barred by the Feres Doctrine and Can Be Distinguished From the Feres Case

The underlying principle of the *Feres* Doctrine is that to permit a suit by a soldier would be inimical to maintaining the necessary discipline which the military requires.

It would be a relationship between the serviceman and his superiors when he is on duty or in times of war, but in the instant case, during peacetime where the serviceman goes to an entirely different locale for medical services, to a completely autonomous and different branch of service, the relationship to his unit and his unit's superiors no longer exists.

If Jerome Williams had gone to a civilian medical facility five miles from his base and been injured there would be no concern or doubt that he would have the right to recover. It doesn't make sense that he should be barred from recovery in this case when he went to a totally unrelated facility in another branch of the service 420 miles from his home base.

Jerome Williams was on authorized leave off his base having no military duty to perform on that date and it would be difficult to see how permitting this suit to proceed would encourage the flouting of military orders or discourage their issuance. The threat to military discipline is minimal. The Petitioner is not asking this court to inquire into activities which are distinctively military in nature. The Petitioner alleged only that government personnel were negligent in their dental treatment of Jerome Williams. These allegations in no way implicate distinctively military activity. How can an inquiry into a dentist's performance of a simple office procedure threaten the military relationships which are the primary focus of the *Feres* Doctrine.

This activity is not an integral part of or an activity unique to military duty, training or combat.

The case involves only an inquiry into routine dental work which happened to be performed by army dental personnel. There is nothing of distinctive military character

in routine dental work. The court will not have to inquire into the complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force, nor will an inquiry into the dental procedure given undermine the special nature of military life or the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel.

It also doesn't make sense that the U. S. Supreme Court in the case of,

United States v. Muniz,
374 U.S. 150

allowed recovery to persons in federal penitentiaries for injuries arising from negligence of prison officials and then turned around and denied a serviceman the same right.

The *Feres* Doctrine has been distinguished and questioned in a number of situations where recovery has been allowed.

Allowing recovery in this case would not threaten to compromise military discipline.

The Decision of the Sixth Circuit Conflicts With Decisions of Other Circuits

A recent case out of the United States Court of Appeals for the Seventh District,

L. Ann West, et al. v. United States of America,
Case Number 83-1842, Decided March 14, 1984

determined in a comparable type of claim that although the Plaintiff in the case was engaged in activity incident to his service for purposes of the Federal Tort Claims Act, the court found that notwithstanding this that such incident

of service did not threaten military discipline and reversed the District Court's ruling dismissing the action for lack of subject matter jurisdiction and remanded the case for further proceedings.

The Supreme Court recently in the case of,

Lockheed Air Craft Corp. v. U. S. et al.,
51 Law Week 4206, decided Feb. 1984

held that the F.E.C.A. even though it specifically prohibited actions against the U. S. by employees, their legal representatives, spouses, dependents, and next of kin because of an employee injury or death, permitted an indemnity claim. An analogy can be drawn between this decision and a rethinking of the *Feres* Doctrine by the Supreme Court.

The U. S. Court of Appeals for the District of Columbia in the case of,

Hunt v. United States of America,
636 F.2d 580 (1980)

permitted military personnel who had received swine flu inoculations while on active military duty to bring suit against the United States.

See also,

United States v. Brown,
348 U.S. 110

The claimant had injured his knee while in the service and after discharge had received negligent treatment of the knee at a VA hospital. But for Brown's military service, he would neither have hurt his knee nor have been at a VA hospital. Nevertheless the Supreme Court recognized his right to recover against the government.

The mere fact that a claimant at the time of injury is a serviceman does not automatically bar his Federal Tort Claims Act relief.

Hale v. United States,
416 F.2d 355 (6th Cir.)

The U. S. Supreme Court in the case of,

United States v. Muniz,
374 U.S. 150

in discussing the *Feres* Doctrine, the court said,

"There is no justification for this Court to read exemptions into the Act beyond those provided by Congress."

See also,

Parker v. United States,
611 F.2d 1007 (5th Cir. 1980)

2. United States

"An off-duty serviceman on a four-day furlough driving a civilian vehicle towards his home off the military reservation was not acting 'incident to service' when he was involved in a collision with a vehicle operated by another serviceman, and therefore Government would be liable like any 'private person' and survivors were not barred from bringing action under Federal Tort Claims Act."

The soldier is subject at all times to military law and discipline; and, unlike other employees, he is without power to terminate his status at will. On the other hand, the soldier is still a citizen; for the most part, his military status does not relieve him of his rights and duties under the civil and criminal law of the community. He still

may sue and be sued as a private person. Moreover, as the Armed Forces take on more and more of the characteristics of a citizens' army, fed by an unprecedented peacetime enlistment and maintained at substantial size, there seems to be less reason than ever for treating the soldier as different from the civilian, except in the peculiarly military aspects of his life.

Knecht v. United States,
144 F. Supp. 786

The district court allowed recovery for a soldier on leave who was returning to his base when he became involved in a fatal motor vehicle collision with a truck and trailer owned and operated by the United States government.

For a similar decision, see:

Barnes v. United States,
103 F. Supp. 51

In the case of,

Hand v. United States,
260 F. Supp. 38, U. S. District Court
M. D. Georgia, Columbus Division, Aug. 3, 1966

it was held that a United States soldier who was on pass and riding in an automobile on way to quail hunt was not precluded from recovery under the Tort Claims Act for injuries sustained in an accident on a highway passing through a military reservation.

Downes v. United States,
249 F. Supp. 626, U. S. District Court
E.D. North Carolina, New Bern Division, Sept. 28, 1965

In the above case recovery was allowed a United States Marine whose automobile collided on his base with a truck operated by another marine when he was leaving the base on pass at the time of the collision.

In the case of,

Fischer v. United States,
451 F. Supp. 918, U. S. District Court
E.D. New York, June 8, 1978

recovery was allowed by an Air Force academy football team member for injuries sustained as a result of a medication prescribed by team physicians. The court held that action could be maintained under the Federal Tort Claims Act and the claims were not barred as having arisen out of military service, since at the time of the alleged negligent acts the cadet was not on active duty or on military discipline.

This Case Raises Important Questions of Applying Federal Law in a New Era of Responsibility Which Need to Be Settled by This Court

Under the prevailing *Feres* rule, a soldier is deprived of the civilian's recourse to the Federal Tort Claims Act in practically any contact he may have with a government agency or instrumentality while on duty, on base, or on his way to or from his place of duty. *Feres* represents the only judicially created exception to the Federal Tort Claims Act. There is neither support in the language of the Act nor in its legislative history justifying this exception.

The judiciary has evaluated military issues without any disruption of military order and without threatening the general autonomy of the armed forces or disturbing uniformity of military standards of conduct.

Feres has placed an undesirable and inequitable disability upon members of the armed services. That burden is inconsistent with modern law and policy regarding the legal status of military personnel. A soldier is ready to risk life and limb where national survival is at stake, but there is no justification for requiring him to bear the risk of operational negligence in domestic, non-combat circumstances, where the potential loss to him is great and the risk to military interests minimal. The time has come for the Court or Congress to abolish the *Feres* rule.

Petitioner respectfully requests the court to re-evaluate these issues and re-examine the *Feres* Doctrine where negligence occurs outside the context of a soldier's own military base and outside the context of a military or combative operation.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed September 28, 1984)

No. 83-3600

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOANN WILLIAMS,
Plaintiff-Appellant,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

BEFORE: CONTIE, *Circuit Judge;* PHILLIPS, *Senior Circuit Judge;* and GILMORE, *District Judge**

This case has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and record, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

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*The Honorable Horace W. Gilmore, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

In this action brought under the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.*, plaintiff seeks monetary damages for wrongful death caused by medical malpractice. The decedent was plaintiff's husband. He died, while a member of the Air Force, after receiving dental treatment at an Army medical facility. The district court dismissed the complaint and plaintiff filed this appeal.

Upon consideration, we find the district court's ruling to have been proper. We agree that under *Feres v. United States*, 340 U.S. 135 (1950), plaintiff has failed to state a claim for relief and we affirm for the reasons as set forth in the opinion of the district court filed July 26, 1983.

It appearing therefore that the question on which decision of the cause depends is so unsubstantial as not to need further argument, Rule 9(d)(3), Rules of the Sixth Circuit.

It is ORDERED that the final order of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed July 26, 1983)

C83-1289-Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOANN WILLIAMS, Administratrix of the Estate of JEROME WILLIAMS, Deceased, *et al.*,
Plaintiffs,

vs.

DEPARTMENT OF THE ARMY, UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM AND ORDER

The plaintiff, JoAnn Williams, has brought a wrongful death action under the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.* She is the widow of Airman Jerome Williams, who died while on active duty in the United States Air Force. Decedent, Jerome Williams was ordered to proceed from his active duty station at Cannon Air Force Base to William Beaumont Army Medical Center for an outpatient appointment at the Oral Surgery department. During the procedure, complications developed and Airman Williams subsequently died. On or about July 23, 1982 plaintiffs filed an administrative claim with the Department

of the Army pursuant to the requirements of the Federal Tort Claims Act alleging negligence on the part of the Army doctors incident to their treatment of decedent. The claim was denied by the Army on November 2, 1982. On March 23, 1983 plaintiff filed suit in the District Court under the Federal Tort Claims Act seeking damages for the alleged negligence of the United States. The United States has moved this Court for an order pursuant to Rule 12 and Rule 56 of the Fed. R. Civ. P. for dismissal of the complaint or in the alternative for summary judgment. The motion of the United States to dismiss is based on *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) which precluded suit by a member of the armed forces against the United States.

The Federal Tort Claims Act confers on the District Court broad jurisdiction over civil actions on claims against the United States. However before the Court can decide the case on the merits, the Court must determine whether any claim is cognizable by law. *Feres v. United States, supra.* 28 U.S.C. §1346(b), §2671 *et seq.* The general rule when a federal agency is named as a defendant in an action is that the agency may be sued only if Congress has authorized the action. "The United States is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed. 2d 607 (1980), quoting from *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). Furthermore, even though Congress chose to narrow the United States' scope of sovereign immunity by enacting the Federal Tort Claims Act, the waiver is to be narrowly construed and liability for the United States is limited by statute. *Richardson v. United States,* 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed. 492 (1962).

The Federal Tort Claims Act waives the government's immunity from suit but there are several statutory and judicial exceptions which limit this waiver. Among those exceptions is one for liabilities incident to military service. *Scales v. United States,* 687 F.2d 970 (1982). The Court in *Feres v. Untied States, supra,* held that the federal government is immune from suit by a serviceman under the Federal Tort Claims Act for injuries sustained while on active duty resulting from the negligence of others in the armed forces, including injuries attributable to the malpractice of military physicians. *Howell v. United States,* 489 F. Supp. 147 (W.D. TN 1980), *Pisciotta v. Ferrando,* 428 F. Supp. 685 (S.D. NY 1977). If the claim falls within the *Feres* exception to the waiver of tort liability, this Court lacks jurisdiction to hear the case. *Scales v. United States, supra,* at 972.

Plaintiff's cause of action falls within the *Feres* doctrine because decedent was an active duty serviceman at the time of his death and decedent's death is deemed incident to service, therefore the United States is immune to suit. The government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise cut of or are in the course of activities incident to service. *Feres v. United States, supra. United States v. Brown,* 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954), *Brooks v. United States,* 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949). The Court in *Haas v. United States,* 518 F.2d 1138 (4th Cir. 1975) held that an active duty serviceman who is on temporary off duty status but is engaging in an activity at a military facility as a result of his status as an officer, cannot sue the United States for the alleged negligence of another serviceman. Furthermore, the Court in *Woodside v. United States,* 606 F.2d 134 (6th Cir. 1979) held that "where an activity is provided directly by the

military this activity will be deemed incident to military service precluding a suit against the United States under the Federal Tort Claims Act, even if the activity is not essential to the mission of the military." The Court in *Woodside* specifically included injury or death to an active duty serviceman while receiving medical treatment at a military hospital or medical facility as an incident to service under the *Feres* Doctrine.

In *Veillette v. United States*, 615 F.2d 505 (9th Cir. 1980) an airman stationed at Anderson Air Force Base, Guam went motorcycle riding while off duty. The motorcycle collided with a truck outside the military base and the airman was taken to a Navy hospital. His parents brought a wrongful death action against the United States under the Federal Tort Claims Act alleging negligence by the hospital staff in the care of their son. The Court granted defendant's motion to dismiss for lack of jurisdiction and failure to state a claim holding that allegations of medical malpractice have consistently been held to fall within the *Feres* doctrine when the plaintiff is a serviceman on active duty at the time of the alleged malpractice. The situs of the accident was not a controlling fact. The plaintiff's death was attributable to the negligence of hospital personnel and not the negligence of the truck driver. The treatment he received was considered incident to military service.

Since Congress has provided remedies for servicemen injured on active duty through alternative statutory protections it has never intended to extend the Federal Tort Claims Act to servicemen's medical malpractice claims. *Hawe v. United States*, 670 F.2d 653 (6th Cir. 1982).

Applying these rules to the case at bar, it is clear that plaintiff's Federal Tort Claims action against the

United States falls within the *Feres* Doctrine and thus the Court must dismiss the claim for lack of subject matter jurisdiction. Jerome Williams may have been on temporary leave at the time of his medical treatment however, the Army medical facility and military physician's treatment was provided for him as a direct result of decedent's being an officer of the United States Air Force. Therefore whether or not decedent was on temporary leave is not dispositive of his active duty relationship to the armed services. *Woodside v. United States, supra.* It is apparent that an officer can be on temporary leave yet still be considered an active duty serviceman, thus enabling such officer to take advantage of his military status so that he will be permitted to use military facilities. *Haas v. United States, supra, Veillette v. United States, supra.* Such was the case of Jerome Williams. Because of Jerome Williams' status as an airman, the Army ordered him to the William Beaumont Army Medical Center to receive dental treatment from army doctors. Thus, even if these doctors were negligent in their treatment of Airman Williams, neither decedent nor his estate could sue the United States.

Accordingly, defendant's motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim pursuant to Rule 12 (b)(b) is GRANTED.

IT IS SO ORDERED.

/s/ GEORGE W. WHITE
U.S. District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed July 29, 1983)

C83-1289Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOANN WILLIAMS, Admx., etc.,
Plaintiff,

v.

DEPARTMENT OF THE ARMY
UNITED STATES OF AMERICA,
Defendant.

ORDER

Pursuant to the Court's Memorandum and Order filed July 26, 1983,

IT IS ORDERED that plaintiff's complaint is hereby dismissed at plaintiff's costs.

/s/ GEORGE W. WHITE
United States District Judge